

1 IN THE UNITED STATES DISTRICT COURT.

2 IN AND FOR THE DISTRICT OF DELAWARE

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4 IN RE GOOGLE INC. COOKIE : CIVIL ACTION
5 PLACEMENT CONSUMER PRIVACY :
6 LITIGATION :
----- : NO. 12-MD-2358 (SLR)

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9 Wilmington, Delaware
10 Wednesday, January 11, 2017
11 1:00 o'clock, p.m.

12 - - -

13 BEFORE: HONORABLE SUE L. ROBINSON, U.S.D.C.J.

14 - - -

15 APPEARANCES:

16 KEEFE BARTELS
17 BY: STEPHEN G. GRYGIEL, ESQ.
(Red Bank, New Jersey)

18 -and-

19
20 STRANGE & CARPENTER
21 BY: BRIAN RUSSELL STRANGE, ESQ.
(Los Angeles, California)

22 Counsel for the Class Plaintiffs

23
24 Valerie J. Gunning
25 Official Court Reporter

1 **APPEARANCES (Continued) :**

2 **WILSON SONSINI GOODRICH & ROSATI**

3 **BY: MICHAEL H. RUBIN, ESQ.**
4 **(Palo Alto, California)**

5 **Counsel for Defendant**
6 **Google Inc.**

7 **COMPETITIVE ENTERPRISE INSTITUTE**

8 **BY: Adam Shulman, Esq.**
9 **(Washington, D.C.)**

10 **Counsel for the Theodore H. Frank,**
11 **Objector**

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1 P R O C E E D I N G S

2

3 (Proceedings commenced in the courtroom,
4 beginning at 1:00 p.m.)

5

6 THE COURT: Good afternoon, everyone.

7 (Counsel respond, "Good afternoon, your Honor.")

8 THE COURT: I believe the way I would like to
9 proceed is for the plaintiff, the settling parties, to
10 present a succinct argument since I've read all the papers,
11 but for purposes of the record, why the proposed settlement
12 should be approved.

13 I then would like to hear a succinct summary of
14 the objections which have been filed again, which I have
15 reviewed in full, and then the settling parties' response,
16 the plaintiffs' response to those objections, and then move
17 on to the owners fees and do the same thing essentially.
18 That way I've got a record. I've given everyone an
19 opportunity to bring anything to my attention that wasn't
20 included in the papers, but also to make a record for the
21 highlights of what's in the papers.

22 So that's how I would like to proceed. If
23 anyone has any preliminary issues or concerns about going
24 that way, I'm happy to hear them. I don't know. Let's
25 have some introductions first though for purposes of the

1 record.

2 MR. STRANGE: Good afternoon, your Honor. Brian
3 Strange for the Class Plaintiffs.

4 THE COURT: All right.

5 MR. GRYGIEL: Good afternoon, your Honor. Steve
6 Grygiel for the Class Plaintiffs.

7 THE COURT: All right. Thank you very much.

8 Good afternoon.

9 MR. RUBIN: Good afternoon, your Honor. Michael
10 Rubin for Google.

11 THE COURT: All right.

12 MR. SCHULMAN: Good afternoon, your Honor. Adam
13 Schulman for Objector, Theodore H. Frank.

14 THE COURT: All right. Thank you.

15 All right. Well, let's start with the
16 proponents' summary of why this settlement is fair,
17 reasonable, and should be approved.

18 Mr. Strange?

19 MR. STRANGE: Thank you, your Honor. And thank
20 you for the opportunity to be here again.

21 Just briefly, this case started back in --

22 THE COURT: I was going to say, this lectern is
23 lamentable in that the people seated behind you can't
24 necessarily see me or me them, so, Mr. Schulman, you may sit
25 wherever you want to to get a view.

1 MR. SCHULMAN: Thank you, your Honor.

2 THE COURT: If my face happens to be of any
3 interest to you. You may proceed. I'm sorry.

4 MR. STRANGE: Thank you, your Honor. This case
5 started back in early 2012, when multiple cases were filed
6 around the country. They were MDLs, ultimately to your
7 Honor's courtroom, and that was quite some time ago. We had
8 hearings on leadership and my firm along with others were
9 honored to be entrusted with the leadership of this case.
10 We then filed a consolidated class complaint in December of
11 2012. We did further research and filed an Amended
12 Complaint in January of 2013. We engaged in discovery,
13 including initial disclosures with Google and others,
14 interrogatories and requests for production of documents.
15 Ultimately, Google filed a motion to dismiss in January of
16 2013, and after extensive briefing on extremely complicated
17 issues, your Honor heard oral argument in July of 2013 and
18 ultimately granted the motion to dismiss in October.

19 The plaintiffs then filed an appeal to the Third
20 Circuit. There was again extensive briefing in the Third
21 Circuit and oral argument. Ultimately, the Third Circuit
22 affirmed your Honor on the dismissal of the statutory claims
23 and held that only two claims remained. Those were under
24 California State law, one claim for intrusion of privacy and
25 one for the right of privacy under the California

1 Constitution.

2 When we received that opinion, we were hopeful
3 it would have statutory claims in it, but unfortunately it
4 did not, but nevertheless, we filed a writ with the U.S.
5 Supreme Court, as your Honor is probably aware, and the U.S.
6 Supreme Court expressed some interest because of the, we
7 think the areas of privacy are at the forefront of issues
8 these days.

9 The Supreme Court ordered Google to respond in
10 May of 2016, but ultimately denied the petition in October
11 of 2016.

12 When we began a new the case after it was
13 remanded from the Third Circuit, we had discussions with
14 Google about settling the case. Ultimately, we both agreed
15 that retired Judge Layne Phillips would preside over a
16 mediation. Judge Phillips is a retired federal judge and I
17 think widely recognized by both the defendants and the
18 plaintiffs as far as an extremely talented mediator.

19 Prior to that mediation, we did extensive
20 briefing with Judge Phillips' office and had extensive phone
21 calls regarding the merits of our case, class certification,
22 discovery and, most importantly, damages for the remaining
23 claims.

24 In the all-day mediation in May, we had a
25 tentative deal which took us about 30 days to ultimately

1 execute in June of 2016. We then presented it to your Honor
2 for preliminary approval, which was given on August 31st,
3 2016.

4 Pursuant to that order, we gave notice by a very
5 reputable company to millions and millions of people, both
6 on the Internet, through websites, through advertisements
7 and periodicals, and ultimately filed with the final
8 approval a declaration by the claims administrator and a
9 notice administrator as to the reach in his professional
10 opinion of that notice. There has been no objection nor
11 do I think there can be about the sufficiency of the notice.

12 There was 50 timely requests for exclusions.
13 With respect to the settlement, the amount is 5.5 million
14 and including injunctive relief of Google's assurances that
15 it will give the counsel, assuming this Court gives final
16 approval, that it took actions and what actions it took to
17 expire or delete all of the cookies from the Safari browsers
18 that are at issue in this case.

19 One of the things that we noted in our papers is
20 that in considering to settle this case, not only did we
21 consider damages and liabilities, but we considered the fact
22 that Google has stated to government authorities that at
23 most, it made \$4 million as a result of the conduct and it
24 has paid the FTC and other government entities over eight
25 times that amount as penalties.

1 In terms of approval of the settlement under
2 Rule 23(a) and Rule 23(b) (2), the first issue would be
3 numerosity. I don't think there's any dispute that this
4 case involves millions of users of the Safari browser, the
5 Internet Explore, and so there's nothing more to discuss on
6 the numerosity. It's clearly satisfied here under the Third
7 Circuit standards.

8 In terms of the common questions of law and
9 fact, the courts have been clear that one common question of
10 law and fact would be enough. Here, Google's practice that
11 we've alleged of placing a mechanism to circumvent the
12 browser for Safari and Internet is the same for all the
13 class members. So whether their conduct violates the
14 remaining claims of California State law is a common legal
15 question. How Google carried out that act is a common
16 factual question, so that the common questions are clearly
17 present here for certification.

18 In terms of the next category of typicality, the
19 representative plaintiffs' claims are identical to the
20 class, which is that their rights of privacy were violated
21 as a result of the circumvention of their privacy control.

22 The fourth factor is whether the plaintiffs will
23 fairly and adequately protect the class. The two factors
24 there would be whether you've appointed qualified counsel,
25 and we believe we've met those requirements, my firm and the

1 other two firms as lead counsel along with the firms acting
2 in the executive committee.

3 And the second factor for adequacy is whether
4 the representative plaintiff suffered the same injury as the
5 class, and here there's no intraclass conflict of the same
6 exact injury.

7 Finally, under Rule 23(b)(2), the injunctive
8 relief, Google's conduct is the same for all class members
9 and its agreement here to provide assurances it has
10 eliminated these cookies affects the class the same.

11 So having satisfied we believe the requirements
12 to certify the class, on the issue about whether the
13 settlement is fair, reasonable and adequate, there are a few
14 factors which I think are important.

15 Number one, did not lose sight of the fact, and
16 I'm sure your Honor having sat on this Court is aware of the
17 public policy which favors settlements in these types of
18 cases as described in the In re: GM Pickup case.

19 The second factor is that this settlement is
20 entitled to a presumption of fairness, and that would be
21 recently reiterated by the Third Circuit in the In re: NFL
22 case. The factors to determine whether it's entitled to a
23 presumption of fairness would be whether it was negotiated
24 at arm's length, which it was; whether there's sufficient
25 discovery, which there was; whether the proponents of the

1 settlement are experienced in similar litigation, which we
2 are, and clearly, Google's counsel is also from Wilson
3 Sonsini.

4 And the second factor, the fourth factor, excuse
5 me, is whether a small fraction of the class objected, and
6 here, we have one objector out of millions of class members.

7 So I think this settlement is entitled to a
8 presumption of fairness.

9 Then we get down to the Girsh factors which have
10 been established by the Third Circuit to review fairness.
11 The first factor is the complexity, expense and likely
12 duration of this litigation.

13 We're standing -- I'm standing here, your Honor,
14 which in February will be five years, so I think the length
15 is self-evident. We've yet to fully litigate the two
16 remaining claims. And the issue of damages on these types
17 of claims which involved nominal damages for violation of
18 rights of privacy are issues of first impression, and so the
19 complexity and the litigation that would ensue and the
20 expense of litigating these types of claims is significant
21 and therefore I think we've satisfied that requirement of
22 Girsh.

23 The Class' reaction to the settlement. Again,
24 the issue there is whether the class supports the
25 settlement, and here with only one objection out of millions

1 of class members, I think it's safe to say the class
2 overwhelmingly does support the settlement.

3 The third is the stage of the proceedings. We
4 have, unlike some cases, we have actually gone up to the
5 Court of Appeals and had extensive briefing on all the
6 claims in this case in addition to the discovery, so I
7 think the stage of the proceedings is strongly in our
8 favor.

9 The fourth is the risk of establishing
10 liability. And on this factor, your Honor, the Court's
11 don't delve into the intricacy of the merits. A lot
12 of times they give credence to the class counsel about
13 what their chances are of succeeding, and here, one
14 of the seminal issues is under the California remaining
15 claims, we have to prove intentional conduct on behalf of
16 Google.

17 Now, we feel we have a good argument, but Google
18 has a strong argument with able counsel that, in fact, the
19 conduct was not intentional, that they didn't realize that
20 there was a particular method in which these Safari browsers
21 worked so that their code, we wouldn't mesh with it. So
22 that's a fact that would be severely and ably litigated
23 here, and that's one of several issues on which we could
24 lose liability. So I think that factor bodes in favor of
25 settlement.

1 The fifth factor is the risk of establishing
2 damages. And, your Honor, I alluded to this earlier, but
3 under these claims for invasion of privacy, it would be
4 difficult to take each class member who had a browser and
5 had the privacy controls circumvented and therefore had a
6 cookie on it to establish how much of their damages. We
7 think that our best argument would be nominal damages which
8 are allowed under the California right to privacy, but
9 nominal damages are a dollar or two at most per plaintiff.
10 So the risk of actually establishing those damages on a
11 classwide basis is unique. So when we come to a situation
12 we can make a settlement, that benefits the whole class
13 instead of a dollar or two per class member, the advantages
14 to the class I think are self-evident.

15 Then there's the six factors, the risk of
16 maintaining a class action through trial. I mean,
17 obviously, first obtaining the class cert is a novel issue
18 here in light of the complexities of the computer issues
19 we're discussing. In terms of maintaining it through trial,
20 the courts don't give a lot of weight to that since a
21 settlement avoids trial, but those risks also bode in favor
22 of settlement.

23 The seventh factor is the ability of a defendant
24 to withstand a greater judgment. Clearly, Google could
25 withstand a greater judgment, but again the Court has given,

1 has not given a lot of weight to that factor.

2 The eighth factor is the range of reasonableness
3 in settlement in light of the best possible recovery and all
4 attendant risk of litigation. And I think I would go back
5 now to the issue of nominal damages, where there's a risk we
6 could get zero. There's a risk that even if we win, that
7 the class members would be better off to have a settlement
8 of this nature.

9 So I think under the Girsh factors, we clearly
10 have a settlement which complies with most, if not all of
11 them, and the settlement should be approved as fair,
12 adequate and reasonable. And I would just conclude with the
13 fact that it's not -- the issue is not whether this is the
14 best settlement possible under all circumstances. It's
15 whether under these factors, given the consideration of
16 counsel and the stage of the proceedings, is it fair,
17 reasonable and adequate, and I believe under the Third
18 Circuit, it is, and I would request approval.

19 THE COURT: All right. Thank you very much.

20 MR. STRANGE: Thank you.

21 THE COURT: All right. Let's hear from the sole
22 objector.

23 MR. SCHULMAN: Thank you, your Honor. Good
24 afternoon. Adam Schulman for Objector Frank. And there are
25 a couple of preliminary threshold issues I wanted to touch

1 on before I get to the merits of the objection. I guess the
2 less pleasant of the task is addressing the ad hominem
3 attacks that were levied against my employer and my client
4 in the plaintiffs' response papers.

5 As an initial matter, they submitted several
6 exhibits attached to their response which weren't -- in the
7 documents there and weren't authenticated as required under
8 Rule 901 of the Federal Rules of Evidence, so they should be
9 disregarded for that reason. And so we hope your Honor is
10 going to entirely disregard them, but if not, I would like
11 to ask the Court leave to file a supplemental declaration
12 rebutting the inaccuracies in those documents.

13 THE COURT: Well, to tell you the truth, I don't
14 think my decision will hinge on your client's personal --

15 MR. SCHULMAN: Viewpoints?

16 THE COURT: Viewpoints, or --

17 MR. SCHULMAN: His income.

18 THE COURT: Litigation or anything else. I
19 just --

20 MR. SCHULMAN: Okay. Well, that makes life a
21 lot easier then. Thank you.

22 THE COURT: And certainly, if I find out,
23 because I do feel compelled to issue something in writing --

24 MR. SCHULMAN: Right.

25 THE COURT: -- especially because it's a

1 multidistrict case, I plan on sharing some thoughts at the
2 end of this hearing, but I do need to write. If in writing
3 I find that I'm relying on something that we've just talked
4 about, I will reach out to you.

5 MR. SCHULMAN: Thank you. Thank you, your
6 Honor. We just want to be clear for the record if you were
7 going to do so. Thank you.

8 I guess the second threshold matter was this
9 assertion thrown in at the end of plaintiffs' response that
10 my client does not have standing, and that's completely
11 fallacious for a number of reasons.

12 First, what they quote there in their response
13 is not actually the class definition that your Honor
14 approved in the preliminary approval order or in the
15 settlement agreement. The class definition states as
16 follows: All persons in the United States who use the Apple
17 Safari or Microsoft Internet Explorer web browsers and who
18 visited a website from which the whole Click.net cookies
19 were placed by means alleged in the complaint.

20 And in Frank's declaration, he actually provides
21 more information than the class member, the named
22 representatives do in the complaint. He visited the website
23 that transmitted the cookies during a class period, so that
24 is -- we see that as just really a throw-in argument. They
25 didn't reference it here and it shouldn't be credited in any

1 way. And, in fact, if that was the actual definition, they
2 had -- the class members had to attest that they did not
3 have pre-existing cookies that remained on their browser to
4 block the new cookies. Right. They allegedly elicit
5 cookies, and nobody, no objector could come forward, because
6 nobody even knows the status today of the cookies on their
7 browser. They know what websites they visited but they
8 don't know the status of their cookies let alone from a
9 period of time five years ago.

10 THE COURT: And again standing isn't -- as I
11 foresee it, standing will not be a basis --

12 MR. SCHULMAN: Okay. Okay. I will move on from
13 that, too. I just wanted to make sure though.

14 So moving on to the merits of the objection,
15 plaintiffs rely a lot on this presumption of fairness. You
16 hear it again today that the Third Circuit sometimes speaks
17 of in class action settlement proceedings, but this
18 presumption only pertains to objections that the total
19 amount obtained is not adequate. That's not my client's
20 objection. We don't dispute that \$5.5 million is sufficient
21 in sum to settle the case. For example, the first time
22 that -- that presumption has no bearing on objections that
23 the settlement miss allocated. In fact, the first time that
24 the Third Circuit invoked that presumption, it was in the
25 GM Trucks case, where they reversed because of a

1 misallocated settlement.

2 Again, each of those four factors that
3 supposedly supports the presumption also applied in the Baby
4 Products case, which the Third Circuit again reversed due to
5 lack of sufficient direct benefit vis-a-vis the proposed
6 distribution.

7 Another factor they focus on in their response
8 and again focus on here today was the presence of a
9 professional mediator, but again that's irrelevant to
10 Frank's objection. The mediator's job is to get the parties
11 in front of him or her to reach settlement amenable to them
12 themselves. It's not to make sure that a settlement is fair
13 to absent class members and approvable under 23(e). That's
14 this Court's duty, not the mediator's duty. In fact, they
15 actually distort a quotation from the Bluetooth Headset
16 Products liability opinion out of the Ninth Circuit. They
17 say that their distortion was that -- they contended that
18 Bluetooth said that the mere presence of a mediator is a
19 factor weighing in favor of non-collusiveness, but if you
20 read the entire opinion from that, that entire sentence from
21 that opinion, it says the mere presence of a neutral
22 mediator, though a factor weighing in non-collusiveness, is
23 not dispositive of whether the end product is a fair and
24 adequate and reasonable settlement. And, again, the Ninth
25 Circuit of the United States reversed the approval of the

1 settlement. They didn't provide any direct benefit to class
2 members.

3 In their papers they next assert that the lack
4 fairness, lack of objection demonstrates fairness, but the
5 Third Circuit itself has rejected that reasoning, again in
6 the GM Trucks decision, where the Court described, quote, "A
7 combination of observations about the practical realities of
8 class actions has led a number of courts to be considerably
9 more cautious about inferring support from a small number of
10 objectors to a sophisticated settlement. Even where there
11 are no incentives or informational barriers to class
12 opposition, the inference of approval drawn from silence may
13 be unwarranted." And if you want the cite for that, that's
14 55 F.3d at 812.

15 Getting to the core of my client's objection, it
16 relates to the use of cy pres and whether that use comports
17 with the seminal Baby Products decision of this circuit.
18 Plaintiffs actually amazingly consign their response to that
19 decision to a mere footnote, arguing that it's inapplicable
20 because direct distribution to class members here are not
21 feasible or efficient. But nothing in that opinion turned
22 on the feasibility of direct distributions. In fact, the
23 settlement presented to the Third Circuit in that case had
24 no direct distributions at all. It only had a claims made
25 process, which is exactly what my client is arguing is

1 feasible here in which he has shown to be feasible, but in
2 dozens of cases cited in his declaration which have similar
3 numbers of class members, similar amounts available, and
4 could be distributed via a claims made procedure.

5 In their papers, plaintiffs also appear to
6 misunderstand why Frank was relying on the Fraley decision,
7 the Facebook v. Fraley decision out of the Northern District
8 of California. We didn't cite it for the legal proposition
9 that as a Cy Pres settlement is improper per se. We rely on
10 it just to demonstrate the fact that this amount of money
11 can be distributed to a class of tens or hundreds of
12 millions of persons during claims process. Thus, the
13 subsequent Lane decision, which is, we think is not
14 applicable for the reasons stated in our papers, has no
15 bearing on the facts of Fraley. We're citing it for the
16 fact of its existence, not the legal proposition in the --
17 that they attribute to us.

18 The case sort of boils down to a question of how
19 your Honor determines what is economically feasible. The
20 plaintiffs set up a straw man that we want a distribution to
21 every single class -- each of the millions of class members,
22 but we don't think that's what economically feasible means
23 and we don't think that's what sufficient justification
24 means under the Third Circuit's Baby Products decision. We
25 think if a claims made settlement is feasible, then you have

1 to pursue that instead of cy pres. That it's not a last
2 resort as required by ALI 3.07 and the consensus of the case
3 law, really. There's no contrary appellate authority saying
4 that cy pres can be anything more than a last resort, but
5 that's what the plaintiffs would prefer your Honor to do to
6 approve of the doctrine in this case.

7 The plaintiffs also pointed to the Subway
8 decision, but that decision didn't involve cy pres at all.
9 It was an injunctive relief settlement, and there the entire
10 amount of money available was \$600,000. It wasn't
11 \$5.5 million. 600,000 is certainly closer to the line of
12 being infeasible to distribute given a couple hundred
13 thousand dollars of administrative costs.

14 Plaintiffs asserted that meaningful data and
15 statistically valid conclusions regarding claims made
16 distributions is extremely difficult to find, but that's not
17 correct. There's a survey from a very well respected claims
18 administrator just two years ago that commissioned a survey
19 of claims rates and publication notice only settlement cases
20 and found that claims rate almost always fall below one
21 percent, which would make it feasible to distribute the
22 amount of money here to class members.

23 And then in response there they say that, well,
24 the center for class action fairness has objected to claims
25 made settlements in other cases, but we only do so when it's

1 being resorted to without any justification or rationale
2 whatsoever. Here, there's a clear rationale. There's
3 obvious reasons. The parties don't have the -- any class
4 members' contact information, which is why you have notice
5 by publication rather than direct notice. That itself is a
6 sufficient reason to use a claims made process.

7 And here, there's a set fund of 5.5 million.
8 The need to thin that fund to make distributions
9 economically feasible is a reason to use a claims made
10 process as well. That way those who feel most injured by
11 Google's allegedly privacy violations can submit a claim and
12 be compensated.

13 So those are our arguments on the core issue of
14 the use of cy pres entirely. Then we have the subsidiary
15 issue of the conflict of interest if a cy pres settlement is
16 justified at all.

17 And we think that while it's commendable that
18 class counsel donates his own time and energy and service to
19 the underserved, it's not commendable that he donates class
20 members money to that same organization for which he serves
21 as chairman of the board, and that's a far more significant
22 conflict than the alma mater conflict that was approved in
23 EasySaver, a case that was then reversed on appeal, and
24 Google Refer, a case that's pending on appeal.

25 By analogy, if you look at the judicial recusal

1 statute under 28 U.S.C. 455, which obviously doesn't apply
2 here, it lists an example of a disqualifying conflict when
3 the judge or judge's spouse is an officer or director of a
4 litigant. Here, we're talking about an officer of a party,
5 of a third party that's receiving class member funds in this
6 case. It's almost self-evidently a conflict of interest in
7 our view. And the fact that the plaintiffs continue to
8 defend it reinforces our contention that they're not
9 acceptable, not acting as acceptable representatives for the
10 class.

11 The reason that they're not acceptable
12 representatives is not simply because of the settlement
13 includes cy pres payments. We represented objectors in
14 numerous cy pres cases without asserting an objection to
15 adequacy of representation. In Baby Products, for example,
16 the initially approved settlement included an oversized
17 cy pres component but we didn't argue that the
18 representation was inadequate because at least class counsel
19 had made some overtures to getting class members money.
20 Here, class counsel proposed to waive class members claims
21 for no compensation at all while themselves seeking almost
22 half of the cash Google is willing to offer up.

23 The Subway decision again cited by the
24 plaintiffs premised its decision finding adequate
25 representation on the fact that settlement did not make

1 class members worse off. There, the defendant provided
2 injunctive relief in exchange for a waiver of class members'
3 injunctive relief claims only at the same time it preserved
4 class members damages claims. This settlement does not do
5 that. It waives all matter of remedy related to the claims
6 alleged in the complaint.

7 And even though that's distinguishable, Frank by
8 no means concedes that Subway is correctly decided on that
9 issue. And oral argument at the Seventh Circuit suggests
10 the Seventh Circuit may reverse in light of the Walgreen
11 opinion, the interceding Walgreen opinion.

12 And then there's the conflict of interest with
13 defendant, which Frank doesn't argue is a per se reason to
14 reject the settlement. Rather, it's a reason that the
15 settlement shouldn't be valued at the sum total of
16 five-and-a-half million.

17 Unlike in the Miller v. Ghiradelli case, for
18 example, there's nothing in the record or settlement to
19 suggest that the donations in this case won't replace other
20 donations that were already earmarked by Google or in the
21 pipeline in some other way.

22 Then I have quite a bit on fees, but I will save
23 that.

24 THE COURT: All right. Thank you very much.

25 MR. STRANGE: Thank you, your Honor. Just

1 starting with the presumption of fairness, a fair reading of
2 the NFL case and the Baby Products case don't restrict the
3 presumption of fairness to certain aspects of the
4 settlement. It just says if the requirements are present,
5 the arm's length negotiation and others, that it's entitled
6 to a presumption of fairness. Obviously, that presumption
7 can be rebutted but it's fair, and that's very clear in the
8 NFL case and the Baby Products case.

9 With respect to the use of cy pres, the Baby
10 Products case is instructive because what it says is, quote,
11 "Although we agree with ALI that cy pres distributions are
12 most appropriate where further individual distributions are
13 economically feasible, we decline to hold that cy pres
14 distributions are only appropriate in the context."

15 The context which becomes clear when reviewing
16 all the cases is that the question is, do the cy pres -- is
17 it economically infeasible to distribute this to the class
18 members? And if so, is cy pres in direct benefit?

19 With respect to the issue of cy pres, there have
20 been a number of settlements which allowed cy pres only
21 because of the difficulty of an economic in feasibility
22 distributing the money. Here, there's no dispute that
23 there's millions of class members, and that if we took,
24 you know, a couple million, three million, four million,
25 however many million and distributed it to tens of millions

1 of class members, it's going to be a small amount per class
2 member.

3 If you go to a claims made, and this was the,
4 the point was made in the Subway case overruling Mr. Frank's
5 objections on the same issue, the Court said, look, when you
6 consider the administrative cost of the claims made, which
7 the Court there noted for a million claims was 2.7 million
8 in her experience, but here it would be clearly over a
9 million dollars just to administer the claim, and then you
10 have to provide the notice, and then when you consider the
11 time of the claim, filling out the claim form, they're going
12 to get pennies on the dollars.

13 And the question is as class counsel and as the
14 Court, is that a bigger benefit to the class, or is it
15 better to -- is it better to give a small amount of money to
16 a small amount of the class or to approve a cy pres which
17 benefits the entire class in an indirect way? And here we
18 have, as in the Lane case, which was authority from the
19 Court of Appeals in the Ninth Circuit, which had a cy pres,
20 a hundred percent cy pres, the Court noted that there were
21 requirements in place as to how the cy pres recipients would
22 use the money. Here as a part of the settlement we
23 stipulated with Google that anybody who receives this cy
24 pres amount has to use it for education, and the exact
25 wording is in the settlement agreement and to assist in the

1 understanding of Internet privacy and security. Millions of
2 dollars sent to that kind of process is much more beneficial
3 to the class in our opinion than a few pennies to some
4 portion of the class members if they get it. So the
5 economic infeasibility is present here as well as it being
6 burdensome and impractical.

7 The standard with respect to the cy pres as set
8 forth in the cases is whether there's a substantial nexus to
9 the interest of the class members by the use of the money
10 and whether you take into consideration the nature of
11 plaintiffs' lawsuit, the objection of the underlying
12 statutes, and the interests of the class.

13 So here, by having strict use of the money to
14 benefit the class through education of Internet privacy and
15 security is in the best interests of the class. That's why
16 the Court of Appeals in the Lane case upheld that issue.

17 So with respect to direct distribution, the
18 standing issue goes to the claims in the complaint which
19 says in 2011, the conduct occurred in 2011 and early 2012.
20 Just for illustrative purposes, in 2011 there were 40
21 million iPhones and desktops sold by Apple. There was 70
22 million desktops sold with Internet through Internet
23 Explorer. So when you are talking about hundreds of
24 millions of people, what benefit is it to the class to only
25 give a portion of those class a small amount of money?

1 The issue with respect to cy pres has to be
2 whether there is a direct benefit to the class and are
3 there sufficient controls in place for the use of that
4 money.

5 Here, there's six proposed recipients of the
6 cy pres. With respect to the alleged conflict, I will just
7 point out that in the Lane versus Facebook case, the Court
8 held that there was not a conflict when it was set up there
9 for the cy pres, that an employee of Facebook was on the
10 Board of Directors of the company that actually decided who
11 should get the money. And so since that is not a conflict,
12 I think it's a stretch to say that since I'm personally one
13 of 70 members of a board of directors on a public interest
14 law firm run by a former federal judge and I have zero
15 financial interest in the company, I don't think that's a
16 conflict.

17 If your Honor feels otherwise, obviously, we
18 cannot use that as a cy pres recipient. There's other
19 cy pres recipients that are available. But I will point out
20 that one of the cases made this point, that it's difficult,
21 you know, to find companies and entities that use this money
22 in a way that's helpful for the Internet privacy and
23 security.

24 And with respect to Google's conflict, I will
25 let them address that. But just because they make donations

1 to those entities doesn't mean they are not making
2 additional donations through the cy pres money from a
3 separate case, and there hasn't been a case that held that
4 that is a conflict of interest.

5 One more point, your Honor, on the Fraley case.
6 There was a big objection by Mr. Frank about it shouldn't be
7 all cy pres and in the end, there was some minimal amount of
8 money given to the class. And in the District Court
9 decision approving that settlement, there was a quote by the
10 Court that basically said it went through the process, and
11 the Court said, quote, "In a sense, adding a direct payment
12 component to the settlement did very little to buttress its
13 overall fairness."

14 So the issue is really what is in the best
15 interests of the class here. And I submit that having an
16 indirect benefit through a cy pres which benefits the exact
17 issue in the case is more beneficial than even if it's
18 feasible to give a few dollars to not even the whole class,
19 only a small number of them.

20 Unless your Honor has any questions?

21 THE COURT: I don't. Thank you very much.

22 MR. STRANGE: Thank you.

23 THE COURT: I don't know whether counsel for
24 Google to like to add anything to the argument in terms of
25 particularly the fact that Google might already be making

1 payments to some of these same organizations and whether
2 that's a conflict that I should care about.

3 MR. RUBIN: Let me quickly address that one
4 point. I think everything else has been thoroughly
5 addressed.

6 No, I don't think that it's a conflict that
7 should concern the Court. I can tell you that Google is a
8 large company. The portion of that company, the people at
9 that company that decide its charitable contribution don't
10 have anything to do with the settling of cases and how those
11 funds are distributed and whether or not these entities
12 identified as cy pres recipients here and those that have
13 received donations in the past, whether they may receive a
14 donation in the future has absolutely nothing to do with
15 this settlement or the factors here. It's completely
16 unrelated. I don't know how to say it any more clearly than
17 that. It's an enormous company. So with that, I will rest,
18 unless your Honor has questions for me.

19 THE COURT: I do not. Thank you very much.

20 MR. RUBIN: Thank you.

21 THE COURT: All right. I will give counsel for
22 the objector just a few minutes, if you want to respond to
23 anything that was said, and then we'll move on to attorney
24 fees.

25 MR. SCHULMAN: Sure. I of course welcome any

1 questions you have.

2 I guess since Fraley was brought up at the end
3 and we think that is a comparator case which shows that
4 distributions are, that most comparable cases, it shows that
5 distributions are feasible here, it wasn't just a pittance.
6 It was \$15 to 600 and more than 600,000 class members.
7 That's a lot of money in aggregate that went to actual class
8 members rather than unrelated charities. I just wanted to
9 clarify that. I think everything else is in the papers and
10 we didn't really hear too much new from that.

11 THE COURT: All right. Thank you.

12 All right. Let's move on to the motion for
13 attorney fees and expenses.

14 MR. STRANGE: Thank you, your Honor. With
15 respect to the motion for attorneys' fees, this is one of
16 those cases that took a long time and had a lot of
17 complexity in terms of the briefing of the federal statutes
18 on wiretapping, and just organizing the group of 12 law
19 firms we had working on the case took effort. And the one
20 thing I will point out is, while I wish we would have
21 prevailed on our argument that these were wiretap violations
22 and we would have had statutory damages per violation, I
23 would have been elated.

24 One thing that we did accomplish, which I don't
25 think is insignificant, and, in fact, the courts have said

1 that a Court of Appeals decision is meaningful to every
2 class member and an important aspect of the law. In the
3 decision here, which is in re Google Cookie Placement
4 Consumer Privacy Litigation, 806 F.3d 125, the Court settled
5 the issue of when is there an injury in fact, and I know
6 that your Honor grappled with that as do many courts across
7 the country about what type of injury do you need to show
8 that, and so I will just submit that that decision is
9 important in the area of privacy and I think will be helpful
10 for the Court to litigate for years to come.

11 So we did describe our hours, as were quite
12 significant, 4,843 hours. \$90,929 in expenses for the 12
13 law firms. The total lodestar is \$3,296,169. The requested
14 fee is a negative lodestar. On a percentage of the fund
15 basis, it's 43.7 percent.

16 On the factors that the courts have said to
17 consider whether a settlement is reasonable include the size
18 of the fund and the number of beneficiaries. Here, the fund
19 is 5.5 million. The number of beneficiaries through
20 indirect benefit is substantial.

21 The presence or absence of substantial
22 objections by class members. Very rarely do you have only
23 one objector, particularly to attorneys' fees, so I think
24 that bodes in our favor, particularly here, since the
25 objector is in the business of objecting to class actions,

1 the scale and efficiency of the attorneys involved. I'm not
2 going to claim to be the skilled one here, but I will say
3 the people working on the appeal did a good job and I think
4 a helpful opinion.

5 The complexity and duration of the litigation.
6 I think the record reflects that it has been over five years
7 and is very complex issues of privacy and the
8 interrelationship between the Internet and the wiretapping
9 act among others.

10 The risk of nonpayment. It has been a long time
11 since this case has been started and we have not gotten
12 paid, except there was a small settlement of \$100,000 in
13 2012, at the very beginning, from a different defendant,
14 which we have not distributed because we thought we might
15 have to pay experts, so we have not been paid fees.

16 The amount of time devoted to the case by Class
17 counsel is quite substantial, as evidenced by my
18 declaration, that of Mr. Grygiel and that of Mr. Frickelton.
19 The value of benefit attributed by other groups. Here, the
20 FTC and the State Attorneys Generals brought actions, but
21 these, our case was completely separate and based on
22 different facts and legal theories than theirs.

23 And then we finally had the awards in similar
24 cases and the percentage of what you get in a private
25 contract. We cited your Honor to the series of cases that

1 said the range is between 20 and 50 percent on a percentage
2 of the fund issue, and for a negative multiplier, we cited
3 the Haught case that said a negative multiplier is below the
4 range found acceptable by the Third Circuit.

5 And, finally, the argument that we shouldn't
6 consider -- we should consider the fact that it's cy pres
7 and not direct to the Class members I think is refuted by
8 the Boeing versus Van Gemert U.S. Supreme Court case we
9 cited, and the Baby Products case also.

10 So while not a perfect case, I think we've done
11 good work, and I request that the Court grant our motion for
12 fees and costs.

13 THE COURT: All right. Thank you.

14 I will hear any objections to such.

15 MR. SCHULMAN: Thank you, your Honor.

16 Plaintiffs' counsel here is seeking nearly 45 percent of the
17 aggregate amount that Google is willing to put up. That's
18 well above the standard mean and median, such an award that
19 has been documented in the literature, the empirical survey
20 of Fitzpatrick as well as the benchmark that has been
21 accepted in courts of this circuit, the 25 percent
22 benchmark. It's almost double that.

23 And it is odd that the plaintiffs' response is,
24 well, you're supposed to consider the particulars of the
25 case because, if anything, the particulars of the case,

1 counsel going the other way here, when class members are
2 getting zero direct benefit and you're going to -- that
3 certainly does not count for an upward deviation from the
4 benchmark. It counts as a downward deviation. And we
5 suggest that no more than, if your Honor is going to approve
6 the certification and settlement, no more than ten percent
7 of the amount available, as the sum of the settlement would
8 be warranted as a fee.

9 Baby Products makes clear that when class
10 members are not getting direct benefit, the percentage
11 should be reduced, when class counsel hasn't had any success
12 in getting fees to actual class members. And here they've
13 had no success, not less success. Boeing v. Van Gemert had
14 no discussion of cy pres. It was a case involving a fee
15 award when there was a common fund of money put forward by
16 Boeing made available to all class members. Here, there's
17 no common fund that has been made available to any class
18 members.

19 THE COURT: And just out of curiosity --

20 MR. SCHULMAN: Sure.

21 THE COURT: -- what is your best authority for
22 this 25-percent benchmark and where in the in re Baby
23 Products case --

24 MR. SCHULMAN: The authority from the benchmark
25 is cited in our objection. It's in a footnote near the --

1 in the fee section.

2 THE COURT: Okay.

3 MR. SCHULMAN: Including the, I believe you
4 cited it in the warfarin approval order 15 years ago, if I'm
5 not mistaken.

6 THE COURT: Trust me, I don't remember.

7 MR. SCHULMAN: Right. It's in the FRD. It
8 should be in a footnote in the fee section for sure.

9 THE COURT: All right.

10 MR. SCHULMAN: So plaintiffs would prefer you to
11 focus on their lodestar and all the time that they've
12 expended and how their multiplier is only .73, but in this
13 circuit for good reason, it is a percentage of recovery
14 method that has primacy.

15 In Baby Products, for example, Class counsel
16 argued that their fee award was reasonable because their
17 multiplier was only 0.37, roughly half of that here, yet the
18 Third Circuit disagreed, commenting that that case showed
19 why the lodestar multiplier wasn't outcome determinative.
20 In other cases the Third Circuit had instructed that the
21 lodestar should not be allowed to, quote, "trump," or,
22 quote, "displace" the primary reliance on the percentage of
23 the common fund method. That was the Rite-Aid Corp., 396
24 F.3d, 205 -- 396 F.3d, 294, a 2005 case. And AT&T
25 securities litigation, 2006 decision.

1 And so the lodestar can't be allowed to displace
2 the percentage methodology. As the Ninth Circuit put it a
3 couple of years ago in the HP Inkjet litigation case,
4 attorneys don't get paid just for work, they get paid for
5 obtaining results, and in this case counsel obtained no
6 results for their actual clients, no direct benefit for
7 their actual clients, which is what matters under Baby
8 Products.

9 And then in the papers the plaintiffs touted its
10 case as risky. We find that odd given the concurrent
11 enforcement actions from the FTC and State Attorney General.
12 That means it was less risky. It also followed on the heels
13 of a blockbuster expose in the Wall Street Journal which
14 uncovered all the wrongdoing, thus again making it less
15 risky, just for those reasons.

16 Obviously, the legal claims obviously had some
17 risk, as many of them were dismissed and then affirmed on
18 appeal, so there was that risk involved, so we don't dispute
19 that. Our main argument is that the percentage method has
20 to be dominant and is dominant in this circuit.

21 And I would love to welcome any other companies
22 your Honor might have.

23 THE COURT: I think I shared with you my
24 questions. Thank you very much.

25 MR. SCHULMAN: Thank you.

1 MR. STRANGE: Your Honor, can I have a brief
2 response?

3 THE COURT: Sure.

4 MR. STRANGE: First, your Honor, I neglected to
5 mention as a part of our order that we did request a
6 thousand dollars incentive award to each of the three
7 representative plaintiffs. I don't think that has been
8 objected to, but it's clearly within the range of
9 reasonableness in this circuit.

10 With respect to the fee, my adversary is
11 mistaken about Baby Products. What Baby Products
12 specifically said was, quote, "We think it is unwise to
13 impose, as Young suggests, a rule requiring district courts
14 to discount attorneys' fees when a portion of the award will
15 be distributed cy pres."

16 That expressly did not hold that. And with
17 respect to the 25 percent rule, that's a Ninth Circuit rule.
18 It is not a rule in the Third Circuit. And we cited on page
19 13 of our request for attorneys' fees the Erie City Retirees
20 Versus City of Erie, Pennsylvania, 192 F. Supp., 2d, 369.
21 See also In re: Combustion 968 F. Supp., Wise at 835 F.
22 Supp. at 980, noting that fee awards typically range from 20
23 to 50 percent of the common fund and awarded 45.3 percent of
24 the settlement fund.

25 So I think in this circuit, it's not a

1 25 percent rule, and that Baby Products doesn't help the
2 objector for attacking our fees.

3 Thank you, your Honor.

4 THE COURT: All right. Thank you.

5 All right. As I said, I'm going to share my
6 thoughts at this moment. I have to say that I might well go
7 back and just look at the attorneys' fees section again, but
8 let me give you my thoughts as of right now.

9 I think as noted, the thrust of the objection is
10 that the settlement should be modified or rejected because
11 rather than providing for direct compensation, it provides
12 for indirect compensation to certain cy pres charities. I
13 have read the cases and conclude the following.

14 Number one, cy pres remedies are routinely
15 approved by courts under various and not exclusive
16 circumstances. Therefore, aside from satisfying the Third
17 Circuit's Girsh versus Jepson factors and Prudential
18 considerations, the settling matters at bar, I believe, need
19 to demonstrate that the proposed cy pres remedy is
20 appropriate under two factors.

21 Number one, a direct monetary payment to absent
22 class members would be de minimis and/or direct distribution
23 would be logistically burdensome, impractical or
24 economically infeasible.

25 And, second, that the proposed cy pres

1 distribution bears a direct and substantial nexus to the
2 interests of absent class members.

3 My review of the papers leads me to believe that
4 the settlement satisfies both of those considerations.

5 With respect to the first factor, having
6 overseen this litigation from the time it was instituted, I
7 believe this has always been a case in which the facts
8 preclude direct individual compensation. The problems
9 related, the related problems having to do with identifying
10 the millions of potential class members and of translating
11 the alleged loss of privacy into cash amounts. I understand
12 that this claims made option and a lottery option have been
13 used. To me though, that does not serve the purpose of this
14 class action, and I believe that the realities of this
15 litigation demonstrate the direct monetary payments to
16 absent class members would be de minimis and would more
17 likely be logistically burdensome, impractical, infeasible,
18 and that the facts of record are clearly distinguishable
19 from those addressed by the Third Circuit in the in re Baby
20 Products litigation.

21 With respect to the second factor, unlike the
22 facts reviewed by the Court in Dennis versus Kellogg, for
23 instance, the record demonstrates that the proposed
24 recipients bear direct and substantial nexus to the
25 interests of the absent Class members, and indeed the only

1 objection raised to the recipients relate to the appearance
2 of alleged conflicts of interest as noted created by the
3 pro bono service of one member of plaintiffs' Executive
4 Committee on the Board of Directors of one of the six
5 recipients and by Google's previous payments to several of
6 the proposed recipients.

7 Again, I find that the facts of record are
8 clearly distinguishable from those discussed in the
9 authorities cited in the objection, and I decline to reject
10 the settlement on certainly that basis.

11 In sum, given that the solitary objection, that
12 only one objection was filed to this proposed settlement,
13 and I find no merit to the objection. I find the settlement
14 to be fair, reasonable and adequate when considered from the
15 perspective of a class as a whole.

16 With respect to attorneys' fees, I'm always
17 skeptical of such requests when the percentage of recovery
18 approaches 50 percent. I understand that in this case,
19 where individual compensation makes no sense, where the
20 injunctive relief was of and is of great benefit as was the
21 resulting case law, and where the requested fee is within
22 the range approved by courts in the Third Circuit, I likely
23 will approve it, but I do want to go back and just check the
24 case law cited by the objector just to confirm my initial
25 read through all of this material.

1 As I said, I need to write something. At this
2 point in time I would predict that I'm going to approve the
3 settlement and the motion for attorneys' fees.

4 I will try to get something in writing, and I
5 don't know whether there are proposed orders that the
6 plaintiffs' counsel would like to hand up so that I can fill
7 them out if, in fact, my writing is consistent with my oral
8 thoughts at this point. And I will try to get whatever I'm
9 doing out just as soon as possible, because obviously, this
10 case is an old one and needs to come to a conclusion.

11 So do you have proposed orders?

12 MR. STRANGE: Yes. They were submitted with our
13 papers.

14 THE COURT: Okay. Do they still say "Proposed
15 Order" on them?

16 MR. STRANGE: Yes, your Honor.

17 THE COURT: Okay. I'm sure I have them in the
18 stack of papers.

19 I do appreciate the work everyone has put in,
20 including that of the objector. Make sure we stay honest
21 here.

22 Are there any other issues that we need to
23 address yet this afternoon?

24 Anything from you, Mr. Strange?

25 MR. STRANGE: No, your Honor. Thank you.

1 THE COURT: All right. Anything from
2 Mr. Schulman?

3 MR. SCHULMAN: No, your Honor. Thank you.

4 THE COURT: All right. And anything from
5 Mr. Rubin?

6 MR. RUBIN: Nothing, your Honor.

7 THE COURT: All right. Thank you very much,
8 counsel.

9 (Court recessed at 2:05 p.m.)

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